INDEX

	Page
Interest of *Amicus Curiae*	2
Summary of Argument	4
Argument	7
Congress has not only not authorized an unincorporated railway labor organization to be sued elsewhere than at its principal place of business in respect of the present cause of action, it has by clearest implication indicated that to be the only place where such an organization can be lawfully reached with process in this type of case	7
A. Nothing in the Judicial Code of 1911 authorized ordinary civil litigation against an unincorporated association elsewhere than at its principal place of business	7
B. It is common ground between the parties that this controversy is unaffected by the venue provision in 29 U.S.C. § 185(c)	11
C. By making special provision for the venue of actions against corporations in its revision of Title 28 in 1948, without any mention of unincorporated associations, Congress plainly rejected the notion of treating the latter like corporations	13
D. No other statute dealing with venue that has been enacted since 1948 has any bearing on the present case	18
E. This Court has recently and emphastically held that whether unincorporated labor unions are to be assimilated to the status of corporations is a matter for legislative rather than judicial determination	21
F. Petitioner is not helped by the recent *Suarez* case	25
Conclusion	27

AUTHORITIES

CASES: Page

American Airlines, Inc. v. *Air Line Pilots Ass'n*, 169 F. Supp. 777 12
American Trucking Assns. v. *United States*, 355 U.S. 141 3
Brotherhood of Locomotive Firemen v. *Graham*, 175 F. 2d 802, reversed on other grounds, 338 U.S. 232 ..... 4, 10, 14, 17
Chapman v. *Barney*, 129 U.S. 677 21
Coleman v. *Brotherhood of Railway & Steamship Clerks*, 228 F. Supp. 276, affirmed on other grounds, 340 F. 2d 206 20
Colorado v. *Toll*, 268 U.S. 228 19
Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426 .. 15
Graham v. *Brotherhood of Locomotive Engineers*, 338 U.S. 232 ..... 11, 25
Interstate Commerce Comm. v. *Railway Labor Executives' Assn.*, 315 U.S. 373 3
Jones v. *Liberty Glass Co.*, 332 U.S. 524 15
Lodge No. 42 v. *International Brotherhood of Boilermakers*, 324 F. 2d 201, certiorari denied, 376 U.S. 913 20
Pure Oil Co. v. *Suarez*, 384 U.S. 202 ..... 6, 25
Railway Labor Executives' Assn. v. *United States*, 339 U.S. 142 3
Railway Labor Executives' Assn. v. *United States*, 355 U.S. 141 3
Rutland Railway Corp. v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21, certiorari denied, 372 U.S. 954 ..... 5, 15, 18
Sperry Products v. *Association of American R.R.*, 132 F. 2d 408 ..... 4, 8, 9, 10, 11, 15, 17, 18, 25
Steelworkers v. *Bouligny, Inc.*, 382 U.S. 145 ..... 6, 21, 22, 23, 24
United Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344 8
United States v. *Alabama*, 362 U.S. 602 20
United States v. *Arredondo*, 6 Pet. 691 17
Webster v. *Fall*, 266 U.S. 507 19
Williams v. *Fanning*, 332 U.S. 490 19
F. W. Woolworth Co. v. *United States*, 91 F. 2d 973, certiorari denied, 302 U.S. 768 15

STATUTES: Page

Act of November 2, 1966, Pub. L. 89-714, 80 Stat. 1111 ..... 5, 19, 20, 21
D. C. Code (1940 ed.) § 11-308 10
Judicial Code of 1911:
Section 48 ..... 4, 8, 9, 15, 17, 18
Section 51 ..... 4, 7, 11, 15, 17, 25
Labor-Management Relations Act:
Section 301(c) 11
Labor-Management Reporting and Disclosure Act of 1959:
Section 102 18
U.S. Code (1926-1946 eds.):
28 U.S.C. § 109 ..... 4, 8
28 U.S.C. § 112 ..... 4, 7, 11, 25
U.S. Code (1952 ed.):
§ 1391 [generally] 5, 13, 25
U.S. Code (current edition):
28 U.S.C. § 1391(a) 19
28 U.S.C. § 1391(b) 5, 19, 20
28 U.S.C. § 1391(c) 5, 6, 16, 18, 21, 25, 26
28 U.S.C. § 1391(e) 19
28 U.S.C. § 1391(f) 19
28 U.S.C. § 1406(a) 10
29 U.S.C. § 152(2) 12
29 U.S.C. § 152(3) 12
29 U.S.C. § 185(c) 5, 6, 11, 12, 25, 26
29 U.S.C. § 401(c) 19
29 U.S.C. § 412 ..... 6, 18, 19, 25, 26
46 U.S.C. § 688 25

MISCELLANEOUS:

F. R. Civ. P., Rule 17(b) 8, 9
H. R. Rep. No. 308, 80th Cong., 1st sess., p. A127 14
H. R. Rep. No. 1893, 89th Cong., 2d sess. 21
Sen. Rep. No. 1752, 89th Cong., 2d sess. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

Pursuant to Rule 42(2) and the written consent of the parties hereto, Railway Labor Executives' Association files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., which is composed of the chief executive officers of each of the following 23 standard national and international railway labor organizations:

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Trainmen
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employes and Bartenders' International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America

Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

The foregoing organizations affiliated with the Railway Labor Executives' Association (hereinafter "Labor Executives") represent, for collective bargaining purposes under the Railway Labor Act, the bulk of the nation's rail employees. This Court has on several occasions recognized Labor Executives as a proper party to appear and speak for those affiliated organizations and their railroad employee members. *Interstate Commerce Comm.* v. *Railway Labor Executives' Assn.*, 315 U.S. 373; *Railway Labor Executives' Assn.* v. *United States*, 339 U.S. 142; *American Trucking Assns.* v. *United States* (and *Railway Labor Executives' Assn.* v. *United States*), 355 U.S. 141.

Each of these organizations has a vital and indeed an obvious interest in the affirmance of the judgment below. For, if the decision below should be reversed, it will follow that every one of the 23 railway labor organizations listed above can be sued, not simply in the judicial district wherein it has its headquarters —i.e., its principal place of business—but in every judicial district in the entire country where any of its hundreds of thousands of employees may find themselves in legal controversy with even a single one of the 95 railroads and switching and terminal companies represented by National Railway Labor Conference (hereinafter "Conference"), which appears as *amicus curiae* against the judgment below; see Conference Br. 39-41.

Otherwise stated, unless the decision below is affirmed, the funds and assets of every national and international railway organization can be reached in every lawsuit brought against any of its subordinates in every judicial district where any of its members operate. Labor Executives have an obvious interest in demonstrating, as they do in this brief, that the court below was plainly and obviously correct in holding that nothing in the statutory materials justifies or supports any such far-reaching consequences; and that the petitioner railroad and Conference are asking this Court to rewrite an Act of Congress, because, fairly construed, the statutes now on the books require rejection of the arguments here advanced to reverse the ruling below.

SUMMARY OF ARGUMENT

A. The only appellate decision on the applicability of the general venue provision of the Judicial Code of 1911 to the present case (§ 51; 28 U.S.C. [1926-1946 eds.] § 112) holds that it did not permit an unincorporated association to be sued elsewhere than at its principal place of business. *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F. 2d 802 (D.C. Cir.), reversed on other grounds, 338 U.S. 232. The case of *Sperry Products* v. *Association of American R.R.*, 132 F. 2d 408 (C.A. 2), dealt only with the substantially broader patent venue provision (Jud. Code § 48; 28 U.S.C. [1926-1946 eds.] § 109), and held that under the terms of that specialized section, which permitted suit to be brought where the defendant committed acts of infringement and had a regular place of business, an unincorporated association could be sued either at its principal place of business or at any of

its regular and established places of business where it might have infringed.

B. The parties are in agreement that, by reason of the inapplicability of the National Labor Relations Act as amended to employers and employees who are subject to the Railway Labor Act as amended, the venue provisions of 29 U.S.C. § 185(c) do not affect the present controversy.

C. By making special provision for the venue of actions against corporations in 1948 without any mention of unincorporated associations, see 28 U.S.C. § 1391 as originally enacted, Congress plainly rejected the notion of treating the latter like corporations; and nothing in the legislative history of the revision of Title 28 of the United States Code even remotely suggests the contrary. It was only by imputing to Congress an intent that it did not express in either the language or the background of 28 U.S.C. § 1391(c) that the court in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21 (C.A. 2), certiorari denied, 372 U.S. 954, was able to conclude that an unincorporated association could be sued in federal question litigation in any judicial district in which it did business. That decision on analysis is shown to be demonstrably wrong, and the court below was well advised not to follow it.

D. No other statute dealing with venue enacted since 1948 has any bearing on the present case. In particular, 28 U.S.C. § 1391(b) as amended in November 1966 does not apply, because the district in which the present claim arose was the Northern District of Ohio, where respondent has its principal place of business; that is where the strike on which the complaint rests was called.

E. This Court has only recently held that whether unincorporated labor unions are to be assimilated to the status of corporations is a matter for legislative rather than judicial determination. *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145. True, that decision dealt with diversity jurisdiction and not with venue, but the whole tenor of its reasoning rejects emphatically the facile transformation of unincorporated labor unions into corporations now urged by the petitioner railroad, transformation that would have this Court rewrite the general venue statute in a way that Congress plainly did not write it in 1948.

F. Finally, the petitioner railroad is not helped by *Pure Oil Co.* v. *Suarez*, 384 U.S. 202. All that that decision holds is that, where a given case falls within two venue statutes, the broader one prevails. But that does not help the railroad here, because the only provision under which the present case could conceivably be brought would be the general statute, 28 U.S.C. § 1391(c).

Congress plainly knows how to make labor unions suable in any district where they do business. 29 U.S.C. § 185(c); 29 U.S.C. § 412. But, admittedly, neither of those provisions is applicable here. Consequently what the petitioner railroad asks here is that this Court rewrite and expand the general venue statute, 28 U.S.C. § 1391(c). The court below, which properly refused the same invitation, was therefore right; and its judgment should accordingly be affirmed.

ARGUMENT

CONGRESS HAS NOT ONLY NOT AUTHORIZED AN UNINCORPORATED RAILWAY LABOR ORGANIZATION TO BE SUED ELSEWHERE THAN AT ITS PRINCIPAL PLACE OF BUSINESS IN RESPECT OF THE PRESENT CAUSE OF ACTION, IT HAS BY CLEAREST IMPLICATION INDICATED THAT TO BE THE ONLY PLACE WHERE SUCH AN ORGANIZATION CAN BE LAWFULLY REACHED IN THIS TYPE OF CASE

Once attention is focused, as it must be, on the enactments made by Congress respecting venue, it becomes plain that the contentions now advanced by the petitioner railroad (hereinafter "Denver & Rio Grande"), and by Conference as its auxiliary, involve, not construction of the applicable statutes, but only arguments for changes in those statutes, arguments that are properly addressed to Congress alone, and that hence are quite inappropriate here.

Labor Executives believe that the correctness of the result reached by the court below will appear most clearly if the several statutory provisions are considered chronologically in the order of their adoption.

A. Nothing in the Judicial Code of 1911 authorized ordinary civil litigation against an unincorporated association elsewhere than at its principal place of business

The general venue provision of the Judicial Code (Sec. 51; 28 U.S.C. [1926-1946 eds.] § 112) mentioned neither corporations nor unincorporated associations in respect of federal question litigation; it spoke only of "any person"; it simply said that—

> "except as provided in the six succeeding sections [28 U.S.C. (1926-1946 eds.) §§ 113-118], no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *"

In respect of patent litigation, there was a broader provision, as follows (Judicial Code, § 48; 28 U.S.C. [1926-1946 eds.] § 109):

> "Sec. 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

Thereafter, in 1922, this Court held in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, that an unincorporated association could be sued on the footing that it had legal personality distinct from that of its members. This conclusion was codified in 1938 by Rule 17(b), F.R. Civ. P., which provided that

> "capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

This background must be kept in mind in evaluating the *decision*—italics advisedly used—the decision in *Sperry Products* v. *Association of American R. R.*, 132 F. 2d 408 (C.A. 2).

That was an action for the infringement of a patent, brought in the Southern District of New York against several defendants including the Association of American Railroads, which had its "principal office" in the District of Columbia. On plaintiff's appeal from a judgment of dismissal (44 F. Supp. 660), the Second Circuit held (132 F. 2d at 411-412):

> "* * * we think that if a patentee chooses to sue an unincorporated association under the doctrine of United Mine Workers v. Coronado Coal Co., supra, 259 U.S. 344, * * * he must do so either at its principal place of business, or at any of the regular and established places of its business where it may have infringed.
>
> * * * * *
>
> "The judgment will therefore be reversed as to the Association * * *. If the plaintiff * * * wishes to proceed against the Association, the issue should first be tried whether its principal place of business is within the Southern District of New York."

Reading Judicial Code § 48 and Rule 17(b) together, the result is foreordained—and the holding a narrow one, easily reached from the statute and from the rule having the effect of statute. Of course it applies only in a patent infringement case; plainly the decision did not deal with any problem under the general venue statute.

All else in *Sperry Products* simply reflects the mental processes of the thoughtful and distinguished judge who wrote the opinion. Accordingly the bulk of the opinion is purest dictum, and however much either Denver & Rio Grande or Conference may savor particular portions of its philosophizing, no portion thereof is authoritative in any precedential sense.

Indeed, the only other decision dealing with the effect of the general venue statute on the suability of an unincorporated association in a district other than that of its principal place of business is squarely against petitioner's reading. *Brotherhood of Locomotive Firemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir.), reversed on other grounds, 338 U.S. 232.

The Brotherhood of Locomotive Firemen had its principal place of business in Cleveland in the Northern District of Ohio. Hence the first question in the cited case was whether Graham's action, brought against the Brotherhood in the District of Columbia, was governed by the local venue provision (D.C. Code [1940 ed.] § 11-308), which prohibited actions by original process against any person "who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided," or whether it was ruled by the general venue provision, Judicial Code § 51 (28 U.S.C. [1946 ed.] § 112), quoted *supra,* p. 7.

The District of Columbia Circuit held itself not required to determine whether the Brotherhood could be said to be "found" within the District of Columbia, in the sense of the local venue provision, by virtue of maintaining there its national legislative representative's office, because in the view of the court the case was governed by the Federal statute; and because, citing the *Sperry Products* case, an unincorporated association is an "inhabitant" only of the district in which its principal place of business is located. However, by reason of the then newly enacted transfer provision, 28 U.S.C. § 1406(a), the District of Columbia Circuit ordered the case transferred to the Northern District of Ohio.

On certiorari, this Court reversed (*Graham* v. *Brotherhood of Locomotive Engineers,* 338 U.S. 232), holding the District of Columbia venue provision to be applicable.

That decision then, like *Sperry Products* and the other case discussed below *(infra,* pp. 25-26), establishes that a particular venue provision prevails over a general one. In *Sperry* the patent provision with its wider scope prevailed over the general venue statute; in *Graham,* the District of Columbia provision with its wider "or found within" similarly governed.

But, as long as Judicial Code § 51 (28 U.S.C. [1926-1946 eds.] § 112) was in effect, no appellate court ever construed it to permit unincorporated associations to be sued in ordinary civil actions involving federal questions anywhere but at such an association's principal place of business.

B. It is common ground between the parties that this controversy is unaffected by the venue provision in 29 U.S.C. § 185(c)

One of the points of agreement—one of the few points of agreement—between the parties in this cause is that the present action is unaffected by the venue provision of Section 301(c) of the Labor-Management Relations Act enacted in 1947, now 29 U.S.C. § 185(c), which reads as follows:

> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized

officers or agents are engaged in representing or acting for employee members."

The basic reason why that provision is inapplicable here is because the National Labor Relations Act, as amended by the Labor-Management Relations Act and as further amended by other legislation, simply has no relevance to any actions or activities that, as here, are subject to the Railway Labor Act.

Thus, the National Labor Relations Act definition of an "employer" specifically excludes "any person subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. § 152(2)), while the same Act's definition of "employee" similarly excludes "any individual employed by an employer subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. § 152(3)).

The scheme, the grievance procedures, indeed every phase and aspect of the Railway Labor Act are totally different from the corresponding provisions of the National Labor Relations Act. There is no need at this juncture to rehearse the differences, all of which are thoroughly familiar to the Court, and all of which are virtually axiomatic so far as the parties to the present litigation are concerned. Significantly, neither Denver & Rio Grande nor Conference rely on 29 U.S.C. § 185(c) in their briefs, and indeed Denver & Rio Grande was at pains earlier to stress the inapplicability of that provision (Reply Br. 4).

Only one decision leans even arguably to the contrary, and that is the ruling of a district court that appears quite unaware of the mutual exclusiveness of the Railway Labor Act and the National Labor Relations Act. *American Airlines, Inc.* v. *Air Line*

Pilots Ass'n, 169 F. Supp. 777 (S.D. N.Y.). Consequently, what is there said (p. 782) regarding "the mood of Congress" cannot be taken seriously—particularly when attention is drawn, as it will be in the section immediately following, to the revision of Title 28 of the United States Code effective in 1948.

C. By making special provision for the venue of actions against corporations in its revision of Title 28 in 1948, without any mention of unincorporated associations, Congress plainly rejected the notion of treating the latter like corporations

As originally enacted in 1948, the venue provision of Title 28 provided as follows:

> **"§ 1391. Venue generally**
>
> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> "(d) An alien may be sued in any district."

The only light shed by the committee report on the differences between § 1391 and the superseded pro-

visions of the Judicial Code appears at p. A127 of H.R. Rep. No. 308, 80th Cong., 1st sess., as follows:

> "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous." [Citing *Ex parte Shaw,* 145 U.S. 444, and two district court decisions.]
>
> * * * * *
>
> "In subsection (c), references to defendants 'found' within a district or voluntarily appearing were omitted. The use of the word 'found' made § 111 of title 28, U.S.C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a nonresident defendant was 'found,' was rejected in *Camp* v. *Gress,* 250 U.S. 308. However, this ambiguity will be obviated in the future by the omission of such reference."

Thus the sum total of the 1948 revision is, first, that Congress made specific provision for actions against corporations in any district in which they did business; and, second, that Congress said nothing about the venue of actions against unincorporated associations, either in the language of the statute or in the committee reports.

Insofar as resort may properly be had to the state of the decisional law, i.e., on the conventional if essentially fictitious basis that Congress is to be deemed to have reenacted what has already been judicially or even administratively decided, the result is not affected in any degree.

The decision in *Brotherhood of Locomotive Firemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir.), which held that an unincorporated association could not be sued outside the district of its principal place of business under the general Federal venue provision, there deemed to

be controlling, certainly cannot be imputed to Congress on any basis, because it was handed down on October 26, 1948, subsequent to the revision of Title 28, which had become law on June 25 of the same year, effective on September 1.

Nor can the decision in *Sperry Products* v. *Association of American Railroads,* 132 F. 2d 408 (C.A. 2), be attributed to Congress, because that case construed, not the general venue provision then in effect, Judicial Code § 51, but only the specific patent infringement provision, Judicial Code § 48, which was broader. All else therein, as has been pointed out, was dictum purely and simply—and certainly Congress cannot be charged with having approvingly reenacted every interestingly phrased dictum emitted since the time of the last previous codification. Cf. *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431; *Jones* v. *Liberty Glass Co.,* 332 U.S. 524, 533-534; cf. *F. W. Woolworth Co.* v. *United States,* 91 F. 2d 973, 976 (C.A. 2) (L. Hand, J.), certiorari denied, 302 U.S. 768.

In short, without imputing to Congress either an intent that it plainly did not have, or an intent that cannot fairly be drawn from the language of what was enacted, it is impossible to find in § 1391(c) any provision for permitting suit against unincorporated organizations elsewhere than at their principal place of business.

Yet that is precisely what the Second Circuit did in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.,* 307 F. 2d 21 (C.A. 2), certiorari denied, 372 U.S. 954. The heart of that decision in respect of venue is at p. 29, where Judge Waterman said:

> "Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not

> only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See Cherico v. Brotherhood of R. R. Trainmen, supra. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius,* and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations."

It would be difficult, it is submitted, to find a more extreme example of judgment by fiat.

The second sentence of the quoted passage, "It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations," is unexceptionable. But the obvious truism there expressed is immediately contradicted by the next sentence, "But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius*"—as if that principle of construction were inoperative except in instances where it was specifically set forth in those exact words—or except where Congress waved a yellow handkerchief to show that it

was legislating in the light of that principle. In this connection it should be noted that, as early as 1832, this Court declared that "'Expressio unius est exclusio alterius,' is an universal maxim in the construction of statutes." *United States* v. *Arredondo,* 6 Pet. 691, 725.

The second sentence then continues—

> "and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c)."

That is a comment that quite overlooks that the *Sperry Products* case was dealing with venue in patent cases (Judicial Code, § 48), not venue generally (Judicial Code, § 51), and which similarly overlooks that the District of Columbia Circuit in the *Graham* case, 175 F. 2d 802, read *Sperry Products* as requiring precisely the opposite result.

Then follows the third sentence:

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

The sentence just quoted really verges on the fantastic, for it includes not only a demonstrably erroneous premise but also a conclusion that involves a palpable *non sequitur.*

The premise is wrong, because the expansion of the residence of a corporation was effected, not by judicial fiat, but by specific legislative provision. In the

Sperry Products case, that expansion was specifically set forth in Judicial Code § 48; today, a similar expansion is applicable in all cases of actions against corporations by virtue of § 1391(c).

And the conclusion is wrong, because it does not at all follow that, because Congress has made particular provision for venue in actions against corporations, Congressional silence in respect of venue in actions against unincorporated associations implies that such proceedings are to be treated just like actions against corporations.

Otherwise stated, the conclusion does not follow even if the premise were correct—and it is not.

In short, the *Rutland Railway* case is, on its face, just as wrong as it could possibly be—and the court below in this case was well advised not to follow it.

D. No other statute dealing with venue that has been enacted since 1948 has any bearing on the present case

Certain other statutes relating to venue will now be discussed, but only for the sake of completeness, as none has any bearing whatever on the central issue of the present case.

(a) Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, now 29 U.S.C. § 412, provides that:

> "Any person whose rights secured by the provisions of this subchapter [Bill of Rights of Member of Labor Organizations] have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district

court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

It is true that the Labor-Management Reporting and Disclosure Act of 1959 covers improper practices under the Railway Labor Act as amended, see 29 U.S.C. § 401(c). But the venue provision just quoted is limited to actions brought for the infringement of individual rights secured by that Act's provisions, and thus it plainly excludes the present action (R. 1-3, 7-10).

Denver & Rio Grande does not rely on 29 U.S.C. § 412 (Rep. Br. 4), and Conference does not mention it.

(b) The 1962 amendment to 28 U.S.C. § 1391, adding subsection (e) to permit Federal officers to be sued in any district, was designed to obviate the "superior officer" doctrine. See *Webster* v. *Fall,* 266 U.S. 507; *Colorado* v. *Toll,* 268 U.S. 228; *Williams* v. *Fanning,* 332 U.S. 490. Section 1391(e) is, obviously, both irrelevant and inapplicable here.

(c) In 1962, Congress added subsection (f) to § 1391 to deal with venue in tort claims arising out of the manufacture and operation, etc., of an automobile, permitting such actions to be brought in the judicial district wherein the act or omission complained of occurred. Subsection (f) was then repealed by the Act of November 2, 1966, Pub. L. 89-714, 80 Stat. 1111, which amended subsections (a) and (b) to include as proper districts for suit the one "in which the claim arose." Accordingly, §§ 1391(a) and (b) now read as follows:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may,

except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Assuming that Public Law 89-714, enacted subsequently to the date of the opinion and judgment below (R. 149, 152, 153), affects this case under the principle of *United States* v. *Alabama,* 362 U.S. 602, 604, and authorities there cited, it is significant that neither Denver & Rio Grande nor Conference contend that its enactment helps them; and neither invokes it directly.

The reason for their position in that regard may require a word of explanation: It is the fact, within the knowledge of Denver & Rio Grande, however much it may be obscured by the successive complaints filed herein (¶ 6, R. 2; ¶ 7, R. 8), that the strike on which the present cause of action rests was called by the respondent Brotherhood at its principal place of business in Cleveland, in the Northern District of Ohio. Accordingly, that is where the present claim arose within the meaning of 28 U.S.C. § 1391(b) as amended. See *Lodge No. 42* v. *International Brotherhood of Boilermakers,* 324 F. 2d 201 (C.A. 6), certiorari denied, 376 U.S. 913; *Coleman* v. *Brotherhood of Railway & Steamship Clerks,* 228 F. Supp. 276, 284 (S.D.N.Y.), affirmed on other grounds, 340 F. 2d 206 (C.A. 2).

That is why the only remarks addressed to the 1966 legislation by petitioner and its supporter are tangential only, and why both refrain from invoking it as determinative. Thus Denver & Rio Grande reads

into this new act an "implicit Congressional purpose" to expand venue (Pet. Br. 20-21, note 1), while Conference thinks it "*may* alleviate some of the serious consequences of the limitation on venue which would otherwise result from an affirmance of the decision below" (Conf. Br. 4, note 2; italics in original).

Conference's comments on Public Law 89-114, like its arguments for expanding § 1391(c) beyond the terms of that provision, are essentially legislative in character, concluding with the remark (Conf. Br. 4, note 2) that "it is predictable that the new provision will breed extensive litigation in the future."

Inasmuch as this precise new provision was drafted by the Judicial Conference of the United States (H.R. Rep. 1893, Sen. Rep. 1752, both 89th Cong., 2d sess.), the quoted comment all but suggests that before the Judicial Conference of the United States undertakes further amendments to Title 28, its members should first consult with the National Railway Labor Conference.

At any rate, it is plain that none of the venue legislation enacted after 1948, all of which has been discussed and set forth in the present subdivision of this brief, has any bearing whatever, much less any controlling effect, on the present controversy.

E. This Court has recently and emphatically held that whether unincorporated labor unions are to be assimilated to the status of corporations is a matter for legislative rather than judicial determination

Only at the last Term, in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, this Court followed the settled rule (*Chapman* v. *Barney*, 129 U.S. 677) that an unincorporated labor union was not a "citizen" for purposes

of diversity jurisdiction, and that if any change was to be made in that rule, so as to give such unions corporate status for diversity purposes, that was a matter for legislative, not judicial, determination.

The court below relied on *Bouligny* in holding that the respondent Brotherhood of Railroad Trainmen could not be sued in the District of Colorado, where it did not maintain its principal place of business (R. 151). Of course the court below was aware that *Bouligny* dealt with diversity rather than with venue; nonetheless it found the rationale of *Bouligny* controlling, saying (R. 151):

> "Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue."

The foregoing passage could be expanded and embellished, but hardly altered in substance.

Of course this Court in *Bouligny* was at pains to limit its decision "for diversity purposes" and "for purposes of diversity jurisdiction"; that limitation was expressed throughout (382 U.S. at 146, 147, 149, 150, 153). But the Court emphatically rejected the facile transformation of unincorporated labor unions into corporations that underlay both the Second Circuit's "great leap forward" in the *Rutland* case—"Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for

venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business" (307 F. 2d at 29)—as well as the similar *tour de force* of the district judge in the *Bouligny* case itself (382 U.S. at 146), that because there is "a trend to treat unincorporated associations in the same manner as corporations and to treat them as citizens of the state wherein the principal office is located," it should follow that there is "no common sense reason for treating an unincorporated national labor union differently from a corporation."

However, since the excerpts just quoted from the Rutland opinion in the Second Circuit and from the *Bouligny* case at the district court level accurately capsulate the consistent theme of what Denver & Rio Grande and Conference are contending here, it seems worthwhile to quote this Court's disposition of the labor-unions-must-be-equated-to-corporations argument in the *Bouligny* case (382 U.S. at 149-150, 150-151, 153; footnotes omitted):

> "In recent years courts and commentators have reflected dissatisfaction with the rule of *Chapman* v. *Barney*. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions and other unincorporated associations, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference. They assert, with considerable

merit, that it is not good judicial administration, nor is it fair, to remit a labor union or other unincorporated association to vagaries of jurisdiction determined by the citizenship of its members and to disregard the fact that unions and associations may exist and have an identity and a local habitation of their own.

* * * * *

"We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.

* * * * *

"Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument — merits stoutly attested by widespread support for the recognition of labor unions as juridical personalities."

Of course *Bouligny* dealt with diversity; of course the present case involves only venue. But the passages just quoted apply with equal force to the present efforts of Denver & Rio Grande and of Conference to have this Court rewrite the venue statute in a way that Congress plainly did not write it in 1948. Their arguments made in favor of reversal in this case are essentially legislative in character. Accordingly they cannot prevail here, not because reasonable men would reject them out of hand, but because this Court is not an appropriate forum for their consideration.

F. Petitioner is not helped by the recent Suarez case

Finally, apparently as a last resort, Denver & Rio Grande invokes another decision of the last Term, *Pure Oil Co.* v. *Suarez,* 384 U.S. 202; see Pet. Br. 16, 22-23, 35-36.

Petitioner's reliance is misplaced. All that the *Suarez* case held was that the venue provision of the Jones Act (46 U.S.C. § 688) was to be held expanded by the later general venue statute, 28 U.S.C. § 1391(c).

Labor Executives would be prepared to go farther, and concede that, whenever there are two venue provisions, both of them applicable on their face, the broader one controls. Certainly that is the learning of a number of the other cases already discussed above, notably *Sperry Products* v. *Association of American R. R.,* 132 F. 2d 408 (C.A. 2), where the broader patent venue provision in Judicial Code § 48 controlled over the general venue provision in Judicial Code § 51, and *Graham* v. *Brotherhood of Locomotive Engineers,* 338 U.S. 232, where the broader District of Columbia venue provision was held applicable rather than the more restricted general provision of Judicial Code § 51 (28 U.S.C. [1946 ed.] § 112).

Similarly, an action under the Labor-Management Relations Act could be maintained under the broad provisions of 29 U.S.C. § 185(c), a section that would plainly not be limited by the narrower general terms of the subsequently enacted 28 U.S.C. § 1391. And, by parity of reasoning, an action to enforce the rights secured by the Labor-Management Reporting and Disclosure Act of 1959 can be brought as provided in 29 U.S.C. § 412, regardless of the terms of § 1391 as

now amended, whenever the latter should prove more restrictive.

But the concession thus made does not help the petitioner here. For Denver & Rio Grande can point to no statute that specifically authorizes suing the respondent Brotherhood of Railroad Trainmen in the District of Colorado where, admittedly, it does not maintain its principal place of business, an omission that is the more significant since Congress plainly knows how to write such a statute; 29 U.S.C. §§ 185(c) and 412, quoted above at pp. 11-12 and 18-19, respectively, show just that.

Consequently, faced with a lack of express authority to cover this situation, faced with the fact of express authority in other situations, Denver & Rio Grande's contentions are simply variations on the theme that the only applicable statute, 28 U.S.C. § 1391(c), should be broadened—which is to say rewritten—by this Court.

Under the rationale of the *Bouligny* case, which indeed marked no new departure in judicial approach, those contentions, however appropriate for presentation to the legislature, are both inappropriate and insufficient when put forward in the present judicial proceeding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,

Counsel for
Railway Labor Executives' Association as Amicus Curiae.

APRIL 1967.